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Supreme Court, U.S
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No. _____

In the Supreme Court of the United States

GREGORY G. EHMANN,
Petitioner,

v.

NORFOLK SOUTHERN CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the jury should have been permitted to consider a railroad employee's claims under the Federal Safety Appliances Act (FSAA), that a railroad coupler was defective, under the FSAA, where its drawbar did not properly function, and abruptly stopped while being moved, thus preventing the knuckle from being properly aligned and further preventing the coupler from being placed in the position necessary for it to automatically couple with other railroad equipment?

PARTIES TO THE PROCEEDINGS

Petitioner

Gregory G. Ehmann, an individual with no corporate affiliations.

Respondent

Norfolk Southern Corporation.

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Other Authorities

Black's Law Dictionary, Electronic Ed. 12

Merriam-Webster's Collegiate Dictionary,
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The American College Dictionary,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Gregory G. Ehmann, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, that has disregarded decisions of this Court and is now in conflict with the decisions of other federal circuits, in the above-captioned case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as follows: *Ehmann v. Norfolk Southern Corp.*, 241 F.3d 791 (6th Cir. 2001)(App. 1a). The decision denying rehearing and/or en banc consideration was filed on April 9, 2001. (App. 25a)

An earlier appeal of the Trial Court's dismissal of the *Federal Safety Appliances Act* (FSAA) claims was dismissed as prematurely filed. The dismissal is reported at 188 F.3d 507 (6th Cir. 1999). The District Court opinion, that initially dismissed the FSAA claims, is reported as follows: *Ehmann v. Norfolk Southern Corp.*, 1999 WL 681555 (N.D. Oh. 1999) (App. 18a).

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on February 28, 2001. (App. 1a) A petition for rehearing and rehearing en banc was timely filed and was denied on April 9, 2001. (App. 25a) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Federal Safety Appliances Act*, 49 U.S.C. §§20301 *et seq.*, in relevant parts, reads as follows:

> "(a) General.--Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines--
>
> (1) a vehicle only if it is equipped with--
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . ." 49 U.S.C. §20302.

STATEMENT OF THE CASE

This case involves a lawsuit brought by a railroad employee (Gregory G. Ehmann), against his railroad employer (Norfolk Southern), for crippling injuries and monetary damages he sustained while attempting to align a defective coupler. The case was originally filed in the United States District Court for the Eastern District of Pennsylvania. It was subsequently transferred to the United States District Court for the Northern District of Ohio (Western Division). Jurisdiction in the district court was founded upon 45 U.S.C. §51 *et seq.*, specifically, 45 U.S.C. §56.

A. The Court of Appeals Opinion

The Court of Appeals for the Sixth Circuit improperly held that it was not relevant whether a coupler failed to function properly when being properly operated by an employee. Instead, the Court of Appeals held that a coupler is not "defective" under the FSAA, and therefore a railroad is not liable for injuries sustained by an employee, unless "the drawbar was *incapable* of performing or producing the desired effect." *Ehmann,* 241 F.3d at 796 (emphasis in original) (App. 10a-11a). The Court of Appeals suggested that the drawbar in this case was not defective because there was no evidence that the drawbar would not have functioned properly at some later time. *Id.* (App. 10a-11a)

B. The Trial Evidence

Mr. Ehmann sustained disabling low back injuries, including a disc herniation and desiccation at level L5/S1, on August 6, 1997. He was employed by the railroad and was performing his railroad duties when he was injured. (R. 1: Complaint, ¶¶ 10, 12)

Mr. Ehmann was working as a brakeman, in a position known as a helper. At approximately 11:00 a.m. Mr. Ehmann was working on track number two. Railroad cars had already been dropped down an incline onto the track. The crew assumed that the cars had automatically coupled after they were rolled downhill and they had bumped into each other. To make certain that the cars were properly coupled, the engineer moved forward to stretch the approximately 800 foot long train. After the train had been stretched, Mr. Ehmann observed that all of the cars had not properly coupled. (NT1, Ehmann at TR 51-54; JA at pages 123-126)

Because not all of the cars had coupled, Mr. Ehmann had to manually adjust the automatic couplers on the two uncoupled cars to prepare them for a second coupling attempt. Mr. Ehmann explained generally how this was done:

> I need to stand anyway. Let's pretend this here is the drawbar. If it's off to one side, you'd have to -- this would be -- the drawbar is connected to what's called the draw -- the knuckle or head, knuckle head. You had to get behind it, and you grabbed a hold of it, and you pushed it over to center, and you look over -- depending on where you're looking. You look over your shoulder to get it to the center. If it wasn't center, the tie wouldn't make. If it was off several inches either way, on either one, the tie wouldn't make. (NT1, Ehmann at TR 45; JA at page 118a)

Mr. Ehmann then explained how he attempted to adjust the cars and their couplers. First, he moved the south drawbar of the east car. It weighed approximately 400 pounds. He moved the drawbar to the center position and then opened the knuckle. (NT1, Ehmann at TR 45, 54; JA at pages 118a, 126)

Mr. Ehmann then went to the other car. He explained, "I got behind [the drawbar], and I started to push, like I did on the previous one, and it flopped over. It went very - - it went over center. * * * It went over very easy. I've never experienced that kind - - I've never had one move that easy. They're 400 pounds. They normally don't move that easy. * * * I realized that it went too far, so I had to go around to the other side and maneuver it back." (NT1, Ehmann at TR 54-55; JA at pages 126-127)

It was during this attempt to move the drawbar back to center that Mr. Ehmann was injured. He explained, "So I started - - I did the same thing. I got behind [the drawbar] . . . and I started pushing, **and all of a sudden it stopped abruptly, and at that point I felt a pop in my back.**" (NT1, Ehmann at TR 55; JA at page 127)

Mr. Ehmann again attempted to move the drawbar into position. As he described, "I kind of stopped and re-gathered my thoughts, and I looked at the drawbar, and I'm thinking, 'What the heck's wrong with this?' It shouldn't have done it, because it moved easy two ways, and **I've never had that happen**, and now I had to get it to the center. * * * So I started to push on it [again], . . . and it still wasn't moving . . . I quit at this point." (NT1, Ehmann at TR 56; JA at page 128)

Shortly after his accident Mr. Ehmann spoke to his supervisors. He told them, "I hurt my back moving the drawbar. I think the drawbar is defective." He explained how the drawbar "stopped abruptly" when he was trying to move it into position. (NT1, Ehmann at TR 62, 63; JA at pages 129, 130)

Mr. Ehmann further testified that moving drawbars is a normal part of his work and that he had never experienced a drawbar abruptly stop. He explained, "I felt it was defective." (NT1, Ehmann at TR 117-122, 129-130; JA at pages 140-145, 146-147)

In addition to Mr. Ehmann's testimony, the jury saw Plaintiff's Exhibit 4. Exhibit 4 was a railroad inspection report concerning the car with the drawbar that had abruptly stopped. The report explained why the drawbar did not function properly. It read:

> "coupler, east end of car (being brake), dry spot on carrier iron, causing coupler body to drag and stop. Moved coupler both ways, grease was on carrier iron but was not evenly distributed". (NT1, Exhibit read into the record at TR 156; JA at page 148)

Mr. Timmons, the Toledo Terminal Superintendent, also testified that Mr. Ehmann had reported the accident to him and that he attempted to recreate the accident. He explained his findings:

> We found that basically what Mr. Ehmann told us is exactly what had happened, that's what we could tell from reenactment was that he attempted to adjust the draw bar and bring it back into the position to – I believe it was to the left. It kind of hung up. (NT2, Timmons at TR 96; JA at page 154)

Mr. Timmons also admitted that the inspection report (Plaintiff Exhibit 4) disclosed that there was a "dry spot on the carrier iron causing the coupler body to drag" (NT2, Timmons at TR 102; JA at page 156), that a drawbar is not supposed to drag to a stop and that the coupler simply did not work as it was supposed to work. (NT2, Timmons at TR 113-114; JA at pages 157-158)

Mr. Lawrence Heath, a railroad car foreman, also testified. He acknowledged that a dry spot would cause a drawbar to stop suddenly while being moved. (NT2, Heath at TR 167; JA at page 163)

Mr. Ehmann testified at trial that the defective drawbar had prevented the cars from ever coupling. He said,

"[T]he automatic couplers failed, and they did not tie." (NT1, Ehmann at TR 117-118; JA at pages 140-141)

Despite this overwhelming evidence that the drawbar and/or coupler mechanism did not function properly, the District Court consistently refused to submit the FSAA claims to the jury. (E.g., NT2, Plaintiff's counsel's request for FSAA instruction and District Court's refusal at TR 268; JA at page 165) This was the subject of the appeal resulting in the Sixth Circuit's decision rendered on February 28, 2001.

REASONS FOR GRANTING THE WRIT

POINT I

The Court Of Appeals For The Sixth Circuit Has Rendered A Decision That Ignored The Definition Established By This Court To Determine Whether A Safety Appliance Is "Defective," And Has Actually Chosen To Narrow This Court's Definition Of "Defective," And In Doing So Has So Radically Departed From Accepted Judicial Proceedings And Congressional Intent To Necessitate The Exercise Of This Court's Supervisory Power To Prevent Further Court Of Appeals' Decisions Which Are In Conflict With Decisions Of This Court.

A. The United States Supreme Court's Definition Of A Defective Safety Appliance Has Been Clearly Articulated In *Myers v. Reading Co.*

In *Myers v. Reading Company*, 331 U.S. 477 (1947), this Court set forth its definition of what constitutes a

defective safety appliance, particularly a defective coupler mechanism.[1] The Court held,

> Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test is the performance of the appliance. Efficient means adequate in performance; producing a properly desired effect. Insufficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate. *Id.* at 483. (citations omitted)

In order to fully understand this definition, it is helpful to examine the underlying case, *Myers v. Reading Co.*, 63 F. Supp. 817 (E.D.Pa. 1945). The trial in the *Myers* case was

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[1] The expansive definition reflected this Court's long history of liberally interpreting, both the FELA and the FSAA, to effectuate the congressional intent of enacting a humanitarian and remedial statute to provide protection for railroad workers. *See e.g.*, *Swinson v. Chicago, St. P., M. and O.R. Co.*, 294 U.S. 529 (1935); *Brady v. Terminal R. Association of St. Louis*, 303 U.S. 10 (1938); *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574 (1945); *Urie v. Thompson*, 337 U.S. 163 (1949); *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987); *Monessen SW. Ry. Co. v. Morgan*, 486 U.S. 330, 343 (1988)(Mr. Justice Blackmun and Mr. Justice Marshall, concurring and dissenting in part); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

held in Philadelphia. The plaintiff, a conductor, was working at the Reading Company's Port Richmond, Philadelphia Yard. While checking the cars he observed that the brake on one car had not been tightened. Mr. Myers then mounted the brake step or platform and began to tighten the brake. He testified that while doing so the train moved. He further testified, that at the same time, the wheel on the handbrake "kicked back," and he could no longer hold onto the wheel. He fell to the ground injuring his back. The jury found that the train had not moved, but it also found that the handbrake was inefficient and contributed to plaintiff's injuries. Thus, the jury award permitted recovery under the FSAA and denied it under the FELA.

The Railroad filed post-trial motions arguing that there was insufficient evidence to permit the jury to conclude that the brake was not efficient. The District Court agreed and granted a Judgment N.O.V. in favor of the Railroad. The District Court referred to plaintiff's case as a "paucity of proof" and ruled that Plaintiff "failed to introduce any evidence from which the jury could reach a rational conclusion as to whether the subsequent performance of the brake was in the normal, natural and usual manner." *Id.* at 821. The District Court further explained that the Plaintiff "failed to produce any evidence which would permit the jury to make a comparison between the performance of the brake wheel in the instant case and a purportedly normal reaction of a brake wheel under the same circumstances so that the jury might rationally conclude that the brake in question did not perform in a normal, natural and usual manner." *Id.* The Third Circuit Court of Appeals affirmed the District Court. *Myers v. Reading Co.*, 155 F.2d 523 (3d Cir. 1946).

This Court reversed and reinstated the Plaintiff's verdict. This Court held that the inefficiency of a safety

appliance can be proven by "showing a failure to function, when operated with due care, in the normal, natural and usual manner." Further, the inefficiency can **also** be shown by a particular defect. *Myers*, 331 U.S. at 483. This Court emphasized that the "test in fact is the performance of the appliance." *Id.* This Court then set forth the definition previously quoted.

This Court's definition of a "defective" safety appliance included certain important aspects:

> 1. An FSAA violation can be found even where there is no evidence showing an actual break in the appliance or a visible defect in it;
>
> 2. The only point in time that is relevant is the time when the employee attempted to use the safety appliance, and it is totally irrelevant whether the appliance worked properly before and/or after the "occasion in question;"
>
> 3. An inefficient appliance means an appliance that does not produce the desired effect **or** that cannot (i.e., incapable of) produce the desired effect. Thus, a safety appliance is inefficient – or defective – if it did not produce the desired effect on the one time in question **or** if it could never produce the desired effect.

This Honorable Court also observed that the evidence presented by the employee, the evidence described by the District Court as a "paucity of proof," was sufficient to support the jury's verdict of FSAA liability. This Court instructed,

> "Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Myers* at 486.

B. The Court of Appeals' Decision Disregards This Court's Definition Of "Defective" And Ignores The Judicial And Congressional Policies Underlying The Definition. This Court's Supervisory Power Should Be Exercised To Prevent The Disregard Of This Court's Decisions By Courts Of Appeals.

Even though this Court has clearly held that a safety appliance is inefficient – or defective – if it did not produce the desired effect on the one time in question **or** if it could never produce the desired effect, the Court of Appeals for the Sixth Circuit held otherwise. It held that a safety appliance is not defective (or inefficient) simply because it did not work when used by the employee. The Court of Appeals incorrectly held that a safety appliance is only defective when it is "*incapable* of producing the desired effect," i.e., when its condition is such that it can never produce the desired effect. *Ehmann,* 241 F.3d at 795. (emphasis in original). The Court of Appeals' definition of defect is significantly narrower than that established by this Court and ignores the

liberal interpretation of the FELA and the FSAA that this Court has followed for well over half a century.

In *Myers,* this Court held that defective is synonymous with inefficient and "inefficient means not producing **or** not capable of producing the desired effect; incapable; incompetent; inadequate." *Myers,* 331 U.S. at 483. The two phrases (not producing; not capable of producing) are separated by the word "or." The word "or" is defined as "a function word to indicate an alternative <coffee *or* tea> <sink *or* swim> . . ." *Merriam-Webster's Collegiate Dictionary,* Online ed. (3-7-2001).[2]

Therefore, this Court has held that a safety appliance is defective, and in violation of the FSAA, if either one of these two alternatives exist: (1) the safety appliance did not produce the desired result when used properly; (2) the safety appliance was not capable of ever producing the desired result.

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[2] Other definitions of the word "or" include:

> "a particle used: 1. to connect words, phrases, or clauses representing alternatives: to be *or* not to be. 2. to connect alternative terms: the Hawaiian *or* Sandwich Islands, *The American College Dictionary*, Random House, N.Y.; "A disjunctive particle used to express an alternative or to give a choice among two or more things," *Black's Law Dictionary,* Electronic ed. The word "either" is an archaic form of "or" and is defined as "being the one or other of the two <take either road>," *Merriam-Webster's Collegiate Dictionary*, Online Ed.

Furthermore, the jury and court should only be concerned with whether the safety appliance functioned properly at the moment in question. This Court's decision in *Myers* holds that it is not relevant whether the safety appliance did, or could have, operated properly before or after the moment at issue.

The undisputed evidence was that Mr. Ehmann operated the drawbar in the normal, natural and usual manner. The effect that Mr. Ehmann desired was for the drawbar to move the knuckle to the center position so that it was able to couple to the other car. Despite being moved normally, the drawbar failed to function properly. Instead, it stopped abruptly and resulted in Mr. Ehmann's injuries. The desired effect, of moving the knuckle to the center position, was not achieved. Both Mr. Ehmann and his supervisor, Mr. Timmons, agreed that the drawbar did not function as it was supposed to function. Mr. Ehmann testified that aligning drawbars and couplers was a normal part of his work and that he had never experienced a drawbar abruptly stop. He explained, "I felt it was defective." (NT1, Ehmann at TR 117-122, 129-130; JA at pages 140-145, 146-147)

This evidence squarely fit within this Court's definition of "defective," but the Court of Appeals for the Sixth Circuit disregarded this Court's definition in *Myers* and substituted its own, significantly narrower, definition. The Court of Appeals did not limit its inquiry to whether the coupler functioned properly when Mr. Ehmann was using it, but instead focused on whether the coupler could have functioned properly at some later time. It is respectfully submitted that this Court's supervisory power should be exercised because of the Sixth Circuit's radical departure from the standards that this Court has established and the

Sixth Circuit's decision to disregard the definitions and standards established by this Court.

The undisputed testimony was sufficient to send Mr. Ehmann's claims under the FSAA to the jury. The District Court committed grievous error in not doing so and the Court of Appeals for the Sixth Circuit compounded the error by affirming the District Court's mistake. Had the Court of Appeals properly applied *Myers*, and had it not narrowed the *Myers* definition of a defective safety appliance, it would have reversed the District Court and returned the case for a new trial of the FSAA issues. Granting of certiorari is essential to correct the injustice caused by the failure of the Court of Appeals to abide by the decisions of this Court.

C. The Court of Appeals' Decision Disregards This Court's Holding That "Defect" Is Based On A Failure To Function Properly At The Time In Question, And Not At An Earlier Or Later Time. This Court's Supervisory Power Should Be Exercised To Prevent The Disregard Of This Court's Decisions By Courts Of Appeals.

Although the Sixth Circuit Court of Appeals ruled that there was no evidence that the coupler was " 'incapable' of performing or producing the desired effect," this conclusion was legally insignificant. There was evidence that the coupler did not produce the desired effect when Mr. Ehmann attempted to use it. As noted previously, a coupler is defective if it **either** does not produce, **or** is not capable of producing, the desired effect *Myers*, 331 U.S. at 483. Since the evidence established a failure to function properly, it was not necessary to establish that it was also incapable of functioning properly.

The Court of Appeals also held that the coupler was not defective under the FSAA because there was no evidence to establish that the coupler would not function properly at a later time. This holding is also legally invalid. This Court's mandate in *Myers* is that only the use at issue is relevant to the finding of an FSAA violation. It is absolutely irrelevant whether the safety appliance had previously operated properly or if it would have operated properly in the future. *Myers*, 331 U.S. at 483. Thus, the Court of Appeals' concern with how the coupler would have operated at some future time was misplaced. The Court of Appeals' decision is completely inconsistent with *Myers* and the other cited decisions of this Court. Granting of certiorari is essential to correct the injustice caused by the refusal of the Court of Appeals to abide by the decisions of this Court.

POINT II

The Court Of Appeals For The Sixth Circuit Has Rendered A Decision That Answers An Important Federal Question, i.e., The Definition Of "Defective" Under The Federal Safety Appliances Act, In A Way That Conflicts With The Decisions Of Other Courts Of Appeals, And Therefore This Court's Intervention Is Necessary To Eliminate This Conflict And Reaffirm The Definitions Established By This Court.

Other Courts of Appeals, faced with the question of what constitutes a defective safety appliance, have held that the safety appliance is defective if it does not function properly when being used, **or in the alternative**, if it is incapable of functioning properly. The Court of Appeals for the Sixth Circuit has now held, in the instant case, that a

safety appliance is not defective merely because it did not function properly when Mr. Ehmann attempted to use it. Contrary to the other circuits, the Sixth Circuit Court of Appeals now holds that a safety appliance is only defective where it is incapable of ever functioning properly.

The Courts of Appeals that disagree with the Sixth Circuit's holding in *Ehmann* are set forth below:

> In *Richmond, F. & P.R. Co.*, 197 F.2d 404, 408 (D.C. Cir. 1952), the D.C. Circuit held that a safety appliance (air brake system) was defective under the FSAA when it failed to function properly. The Court held that the mandated equipment must not only be present, but that it must also function properly. This interpretation was necessary in light of the liberal construction of the statute necessary to promote the safety of trains and of persons on them.
>
> In *Long v. Union R. Co.*, 175 F.2d 198, 201 (3d Cir. 1949), the Third Circuit held that in establishing that a safety appliance was defective the employee has the duty of establishing that the safety appliance "was inefficient not that it was entirely inadequate."
>
> In *Phillips v. Chesapeake & Ohio Ry. Co.*, 475 F.3d 22, 25 (4th Cir. 1973), the Fourth Circuit held that the abnormal operation of a coupler was a defect under the FSAA. The Fourth Circuit also held that "the mere failure of the safety device to operate properly at the time the employee is injured is

> sufficient to show that it is defective even if it operated properly before and after the incident in question."
>
> In *Grogg v. Missouri Pacific R.R. Co.*, 841 F2d 210, 212-213 (8th Cir. 1988), the Eight Circuit held the trial court improperly held that a FSAA violation can only be established by proving the existence of a specific defect. The Court of Appeals held that in addition to a specific defect, a FSAA violation can be established by proving that the device failed to work properly in the instance that resulted in the employee's injury. In *Byler v. Wabash R. Co.*, 196 F.2d 9, 11 (8th Cir. 1952), *cert. denied*, 344 U.S. 826 (1952), the Eight Circuit also held that a FSAA violation is established where "the appliance was defective or out of repair, or failed properly to function at the time the injuries were received . . . "

The decision by the Sixth Circuit Court of Appeals is starkly in conflict with these other Courts of Appeals. In the *Ehmann* decision, for which review by this Court is sought, the Sixth Circuit has concluded that the functioning of the safety appliance, at the time that injuries were received, is not relevant. In the Sixth Circuit, a safety appliance is only considered defective if it was in a condition where is could **never** function as required.

Because of the conflict between the Sixth Circuit, and the other Courts of Appeals, the granting of certiorari is essential. Otherwise, injured railroad employees in the Sixth

Circuit will be deprived of their rights under the FELA and FSAA that are protected in other federal circuits.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Decided and Filed February 28, 2001]

No. 99-4423

GREGORY G. EHMANN, *Plaintiff-Appellant*,

v.

NORFOLK SOUTHERN CORPORATION, *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Ohio at Toledo.
No. 98-07360—John W. Potter, District Judge.

Argued: January 31, 2001

Before: DAUGHTREY and GILMAN, Circuit Judges; HEYBURN, District Judge.*

*The Honorable John G. Heyburn II, United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION

RONALD LEE GILMAN, Circuit Judge. Gregory G. Ehmann, an employee of Norfolk Southern Corporation, sustained lower-back injuries while performing his duties coupling railroad cars. He brought suit against Norfolk Southern under the Federal Safety Appliance Act (SAA), the Federal Employer's Liability Act (FELA), and the Federal Boiler Inspection Act (BIA). The district court granted Norfolk Southern's motion for partial summary judgment, dismissing Ehmann's actions under the SAA and the BIA. His case proceeded to trial on the FELA claim. The jury returned a verdict against Ehmann. Rather than appeal the jury's verdict, Ehmann filed a timely appeal challenging the district court's grant of summary judgment on his SAA claim. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual Background

Ehmann began working for Norfolk Southern in 1966. By 1997, he was a helper responsible for moving train cars in local plants of various industries and facilities. This job also required him to adjust "misaligned drawbars" to ensure that the railcars were properly coupled.

The railroad coupling mechanism has been described as follows:

> A coupler consists of a knuckle joined to the end of a drawbar, which itself is fastened to a

> housing mechanism on the car. A knuckle is a clamp that interlocks with its mate, just as two cupped hands - placed palms together with the fingertips pointing in opposite directions - interlock when the fingers are curled. When cars come together, the open knuckle on one car engages a closed knuckle on the other car, automatically coupling the cars. The drawbar extends the knuckle out from the end of the car and is designed to pivot in its housing, allowing the knuckled end some lateral play to prevent moving cars from derailing on a curved track. As a consequence of this lateral movement, drawbars may remain off center when cars are uncoupled. This misalignment, if not corrected, may prevent cars from coupling by allowing the knuckles to pass by each other. To ensure proper coupling, railroad employees must realign drawbars manually.

Norfolk and W. Ry. Co. v. Hiles, 516 U.S. 400, 401-02 (1996).

On August 6, 1997, while working on a crew that was checking to see that all of the cars on an 800-foot train had properly coupled, Ehmann observed two cars that remained uncoupled. He then proceeded to manually realign the drawbars. To manually align a drawbar, a helper must push the drawbar to the center position so that it will lock with the knuckle of the adjoining railcar. A drawbar and its knuckle weigh approximately 400 pounds.

Although he successfully coupled the first car, Ehmann encountered difficulties with the second. He claimed that when he pushed with his usual force on the drawbar, it flopped to the other side with ease. Because it had moved too far, he went to the other side to push it again, attempting to align it in the center. Ehmann said that the drawbar suddenly stopped moving, at which time he felt a pop in his back. He testified in his pretrial deposition that after the drawbar froze, he made several more attempts to couple the railcars and was eventually successful. Although he recanted this statement at trial, and now claims that the cars were never able to couple, Ehmann's deposition testimony was all that was before the district court when it ruled on his SAA claim.

Ehmann spoke with the Toledo Terminal Superintendent and the Toledo Terminal Trainmaster on the day of the injury. He told them that he had hurt his back while attempting to couple the cars. Ehmann believes that the drawbar in question must have been defective because he has never encountered one in all of his experience that has abruptly stopped moving.

B. Procedural history

Ehmann filed an action against Norfolk Southern in the Eastern District of Pennsylvania on April 21, 1998. His complaint alleged that his employer was liable for his injuries under the negligence provisions of the FELA, 45 U.S.C. §§ 51-60, and under the strict-liability provisions of the SAA, 49 U.S.C. §§ 20301-06, and the BIA, 49 U.S.C. § 20701. After the case was transferred to the Northern District of Ohio, Norfolk Southern moved for partial summary

judgment, seeking dismissal of Ehmann's SAA and BIA claims.

The district court granted Norfolk Southern's motion on June 28, 1999, holding that Ehmann offered insufficient evidence to present a genuine issue of material fact for the jury under either the SAA or the BIA. Ehmann's claim was primarily based on his own conclusion that because the drawbar had abruptly stopped, it must have been defective, and a statement by a fellow employee that the district court excluded as hearsay. The only other evidence he presented was a railroad inspection report that showed that grease on the drawbar was not evenly distributed.

Based on this evidence, Ehmann claims that he presented sufficient proof to show that the drawbar "was defective and failed to function properly." Norfolk Southern countered with an admission from Ehmann that it is routine practice for helpers who are manually aligning drawbars to add grease when they encounter a drawbar that is difficult to center. With these facts before it, the district court concluded that Ehmann had failed to present a genuine issue of material fact sufficient to submit his SAA claim to the jury.

Ehmann's case proceeded to trial in October of 1999 on his FELA claim. During the proceedings before the district court, Ehmann repeatedly requested that the court present his SAA claim to the jury in addition to his FELA cause of action, which the district court refused to do. The jury rendered a verdict against Ehmann.

Ehmann's counsel filed an appeal in August of 1999, challenging the district court's dismissal of his SAA claim.

Because the trial of his FELA claim was still pending, this court dismissed the 1999 appeal without prejudice for lack of an appealable final order. Ehmann later filed a timely appeal of his claim under the SAA once the district court entered a final judgment on his FELA claim. He is not challenging the jury's verdict under the FELA. Instead, Ehmann argues that his SAA claim should have been submitted to the jury. He thus presents us with the question of whether the sudden stoppage of the coupling mechanism due to a lack of lubrication constitutes a "malfunction" for the purposes of strict liability under the SAA.

II. ANALYSIS

A. Standard of review

We review de novo the district court's grant of summary judgment. *See, e.g., Holloway v. Brush,* 220 F.3d 767, 772 (6th Cir. 2000). Summary judgment is proper when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The judge is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A genuine issue for trial exists only when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

B. The Supreme Court has interpreted the SAA to require a showing that an injury resulted from malfunctioning equipment in order to state a claim for liability under that Act

Ehmann claims that the district court misinterpreted the Supreme Court's opinion in *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400 (1996), as well as this court's decision in *Kavorkian v. CSX Transp., Inc.*, 117 F.3d 953 (6th Cir. 1997). In *Hiles*, a railroad worker sued his employer under the SAA for back injuries sustained while realigning an off-center drawbar. *See Hiles*, 516 U.S. at 402. Under 49 U.S.C. § 20302(a)(1), a railroad is required to use cars that are equipped with "couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles."

Hiles argued that this provision should be read to impose liability on the railroad whenever an employee is injured while going between the ends of railcars to manually align off-center drawbars. The Court disagreed. Cognizant that Hiles's reading would create liability any time a drawbar was off-center and required manual aligning, the Court held that "a misaligned drawbar simply is not a violation of [the SAA]." 516 U.S. at 413. The Court, however, surveyed its caselaw interpreting the SAA and concluded that "failure-to-perform cases made clear that the railroad will be liable for injuries caused by **malfunctioning equipment**, even when cars are equipped with automatic couplers." *Id.* at 412 (emphasis added). In sum, the Court held that the simple fact that a misaligned drawbar has prevented cars from coupling does not in and of itself establish SAA liability, but that

liability will be imposed if some specific evidence of malfunctioning equipment is shown to be the direct cause of an employee's injuries sustained while manually aligning the drawbars.

This court faced the same issue raised in *Hiles* in the case of *Kavorkian v. CSX Transp., Inc.*, 117 F.3d 953 (6th Cir. 1997). The railroad employee in *Kavorkian* also suffered a back injury while aligning drawbars on uncoupled cars. *See Kavorkian*, 117 F.3d at 955. Interpreting *Hiles*, the court concluded "that the failure of equipment to perform can constitute a violation of the . . .[SAA] without proof that the equipment is defective." *Id.* at 958. At issue in *Kavorkian* was whether the district court erred in its assignment of the burden of proof in its jury instructions on Kavorkian's claim. It set forth the following framework to state a claim and prove liability under the SAA:

> At least in a case where coupling had been attempted, the plaintiff proves his claim under [the SAA] by demonstrating (1) that the train couplers failed to couple automatically or failed to remain coupled until purposely released, and (2) that this failure caused, in whole or in part, the plaintiff's injury. A defendant may rebut the plaintiff's case by proving both (1) that the equipment was not properly set, *e.g.*, that the drawbars were not properly aligned or that one of the knuckles was not open, and (2) that a defect in the equipment did not cause the equipment to be improperly set, *i.e.*, the equipment became

> improperly set during the ordinary course of railroad operations.

Id. (citation and internal quotation marks omitted). The plaintiff in *Kavorkian* injured his back while pushing a drawbar during a coupling attempt. *See id.* at 955. Despite the jury instruction that improperly placed the burden on Kavorkian to show that "the equipment was properly set," the jury returned a verdict in his favor. *Id.* at 958. The necessary implication is that the jury found that Kavorkian's injury was caused by something other than a simple misalignment of the drawbar. This court affirmed the judgment against the railroad, finding that the district court's instruction was, if anything, more favorable to the railroad than required by the above allocation of the respective burdens of proof.

C. The district court correctly held that Ehmann presented insufficient evidence to state a claim for liability under the SAA

The *Kavorkian* test requires plaintiffs suing under the SAA to demonstrate two things, both of which were satisfied by Ehmann. First, Ehmann's testimony proved that "the train couplers failed to couple automatically." *Kavorkian,* 117 F.3d at 958. Second, he provided proof that the misalignment of the drawbars that he was working on that day "caused, in whole or in part, [his] injuries." *Id.* But Norfolk Southern presented sufficient evidence to rebut its liability under the SAA. It first established that Ehmann had opened both knuckles before attempting to align the off-center drawbars, and noted Ehmann's concession in his deposition testimony that he was eventually successful in coupling the misaligned drawbars. His only evidence of "malfunction" was that

unevenly distributed lubrication caused the drawbar in question to suddenly stop.

Ehmann argues that *Myers v. Reading Co.*, 331 U.S. 477 (1947), sets a low standard for proving a defect under the SAA:

> Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate.

Id. at 483 (holding that the evidence proffered at trial was sufficient to support the original verdict for the plaintiff, which found the railroad liable under the SAA) (internal citation omitted). The claim in *Myers* was brought by a brakeman who sustained an injury while tightening a malfunctioning handbrake. Even in the absence of "precise mechanical defects," the court found that the brake's failure to set was proof of the brake's **incapacity** to do so. The Court explained that "the inefficiency of the brake in this case may have consisted of its defective condition or its defective functional operation resulting, in either case, in its knocking

from the brake platform an experienced railroad man attempting to tighten or set the brake in the customary manner." *Id.* at 484. In Ehmann's case, there is no evidence that the drawbar would not have functioned properly but for the unevenly distributed lubrication. As such, it cannot be said that the drawbar was **incapable** of performing or producing the desired effect.

We believe that Ehmann's case is most similar to that of the plaintiff in *Goedel v. Norfolk & W. Ry. Co.*, 13 F.3d 807 (4th Cir. 1994). In *Goedel*, the railroad worker crushed his foot while kicking a drawbar that had failed to properly align. *See id. at 809.* He complained that the drawbar was defective because it suddenly stopped, and that Norfolk & Western therefore violated the strict liability provisions of the SAA. *See id.* The Fourth Circuit, however, held that Norfolk & Western was not liable. It relied on the fact that the allegedly frozen drawbar had later successfully coupled without any repairs or maintenance. Consequently, it held that there was no proof of a defective coupling mechanism. *See id.* at 812.

Ehmann has provided us with little more information than was before the *Goedel* court. He claims that the drawbar he was pushing suddenly froze, and argues that it froze because of inadequate lubrication. We agree with the district court that this fact, even if true, is insufficient to establish that the drawbar "malfunctioned" within the meaning of the SAA. As Norfolk Southern argues, the lubrication of drawbars is a part of routine maintenance. We have found no case holding that inadequate lubrication on an otherwise fully functioning drawbar provides a basis for strict liability under the SAA, and none has been cited to us by Ehmann.

Inadequate lubrication, on the other hand, might well provide the basis for Norfolk Southern's liability on the theory of negligence. But that was the question presented to the jury under Ehmann's FELA claim. The jury heard the facts and determined that there was no negligence on the part of Norfolk Southern, a determination that Ehmann has not appealed.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

[Filed October 26, 1999]

No. 3:98cv7360

Gregory G. Ehmann, *Plaintiff*,	)
v.	)
Norfolk Southern Corporation, *Defendant*.	)

JUDGMENT IN A CIVIL CASE

■ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

□ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff Gregory G. Ehmann take nothing and the defendant Norfolk Southern Corporation recover of the plaintiff its costs of this action. Case closed.

IT IS SO ORDERED.

/s/_____
JOHN W. POTTER
U.S. District Judge

_____
Date

Geri M. Smith
Clerk

/s/_____
(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed October 18, 1999]

No. 3:98 CV 7360

Gregory G. Ehmann,	)
Plaintiff,	)
	)
v.	)
	)
Norfolk Southern Corporation, t/a	)
Norfolk and Western Railway	)
Company,	)
Defendant.	)
	)

ORDER

Plaintiff's motion for reinstatement of claims under the Federal Safety Appliances Act be and is hereby denied.

So ordered.

/s/_____
James G. Carr
United States District Judge

APPENDIX D

LETTER FROM LAWRENCE A. KATZ TO HONORABLE JAMES G. CARR

[Filed July 27, 1999]

July 8, 1999

The Honorable James G. Carr
United States District Court for the
Northern District of Ohio
203 United States Courthouse
1716 Speilbusch Avenue
Toledo, OH 43624

Re: Gregory G. Ehmann v. Norfolk Southern Corporation
Civil Action No. 3:98 CV 7360

Dear Judge Carr:

I am receipt of your Order of Opinion filed June 28, 1999, granting the Railroad's Motion for Summary Judgment in this case. I respectfully, and very strenuously, disagree with the dismissal of the claims brought under the Federal Safety Appliances Act. I believe that the Court may have not fully appreciated the evidence that was presented by the plaintiff and the significance of that evidence in light of the limited ruling in Hiles.

Accordingly, I respectfully request that the Court reconsider its ruling. I would also request oral argument so that the issues can be thoroughly discussed.

As the Court is aware, an appeal to the United States Court of Appeals for the Sixth Circuit must be filed 30 days after your June 28, 1999 decision. I would hope to avoid this because of the additional delay that it will add to the resolution of Mr. Ehmann's case. Therefore, I sincerely hope that you will grant my request for reconsideration and promptly hold argument either in person or by telephone.

Respectfully yours,

/s/_____
LAWRENCE A. KATZ

cc: Thomas J. Antonini (via fax)

This letter, being deemed a motion for reconsideration, i.e. on review of order entered June 28, 1999. Overruled. So Ordered.(*)

/s/ James G. Carr

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*Italics denote hand-writing in original document.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

[Filed June 28, 1999]

No. 3:98 CV 7360

Gregory G. Ehmann,	)
Plaintiff,	)
	)
v.	)
	)
Norfolk Southern Corporation, t/a	)
Norfolk and Western Railway	)
Company,	)
Defendant.	)
	)

Order

This is an action under the Federal Safety Appliance Act ("FSAA"), 49 U.S.C.A. § 20302(a)(1)(A), Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, et seq. and Federal Boiler Inspection Act ("BIA"), formerly 45 U.S.C. § 23, recodified in 1994 as the Locomotive Inspection Act, 49 U.S.C. § 20701. This court has jurisdiction pursuant to 28 U.S.C. § 1331. Pending is defendant's motion for partial summary judgment as to the FSAA and BIA claims.

(Doc. 17.) For the following reasons, defendant's motion shall be granted.

Background

Plaintiff began working for defendant in 1966 as a brakeman/conductor in the transportation department. (Doc. 17 at 4.) Plaintiff's duties include setting hand brakes, pulling pins, putting tracks in the corner, and adjusting drawbars. (Id at 4.) Plaintiff injured his back while attempting to align or straighten a misaligned drawbar.[1] (Doc. 24 at 1.)

Specifically, plaintiff observed that the drawbars on two cars had bypassed and therefore were not aligned correctly. Plaintiff opened the knuckle and aligned the first drawbar without difficulty and then approached the second car to open the knuckle. When he attempted to center the second drawbar, he pushed it too far over center. Plaintiff then went back around to the other side of the drawbar to push it back towards the center. It moved part way, then abruptly stopped. When plaintiff attempted to move it again, it suddenly stopped and plaintiff injured his back. (Doc. 24 at 2; Doc. 17 at 5.)

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[1]Railroad cars are connected by couplers consisting of knuckles joined to the ends of drawbars. Cars automatically couple when they come together and one car's open knuckle engages the other car's closed knuckle. The drawbar pivots, allowing the knuckled end some lateral play to prevent moving cars from derailing on a curved track. Because of this movement, drawbars may remain off-center when cars are uncoupled and must be realigned manually to ensure proper coupling. (Doc. 17 at 4.)

Discussion

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. See id. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)).

Once the burden of production shifts, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is insufficient "simply to show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the unverified pleadings" and present some type of evidentiary material in support of its position. Celotex, at 324. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Because plaintiff has failed to raise any issue of material fact in response to substantial evidence entered by defendant, summary judgment is appropriate.

A. Federal Safety Appliance Act

Section 2 of the Federal Safety Appliance Act, 49 U.S.C.A. § 20302(a)(1)(A) (Supp. 1995), requires railroad carriers to be equipped with "couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles."[2] A railroad's liability under the FSAA may be predicated on failure of coupling equipment to perform as required by the FSAA. The FSAA creates an absolute duty requiring not only that automatic couplers be present, but also that they actually perform. Norfolk and Western Ry. Co. v. Hiles, 516 U.S. 400 (1996).

In Hiles, however, the Supreme Court held the FSAA is not violated when a drawbar becomes misaligned during the ordinary course of railroad operations. The Supreme Court specifically held section 2 does not make a railroad liable as a matter of law for injuries incurred by a railroad employee while trying to straighten a misaligned drawbar. Id. The Sixth Circuit has followed this Supreme Court precedent in Kavorkian v. CSX Transportation, Inc., 117 F.3d 953 (6th Cir. 1997). In Kavorkian, the Sixth Circuit held:

> In a case where coupling has been attempted, the plaintiff proves his claim under section 2 of the FSAA by demonstrating (1) that the train couplers failed to couple automatically or failed to remain coupled until

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[2]Congress passed the FSAA in 1893 to promote switchyard safety by requiring the use of automatic couplers.

> purposely released, and (2) that this failure caused, in whole or in part, the plaintiff's injury. A defendant may rebut the plaintiff's case by proving both (1) that the equipment was not properly set, e.g. that the drawbars were not properly aligned or that one of the knuckles was not open, and (2) that a defect in the equipment did not cause the equipment to be improperly set, i.e., the equipment became improperly set "during the ordinary course of railroad operations.

Id. at 958.

Plaintiff asserts he injured his back while attempting to line up two drawbars which had bypassed. Plaintiff contends that this injury occurred because the drawbar was defective. (Doc. 24 at 2). In reviewing the available evidence, I find that plaintiff has not set forth specific facts showing a genuine issue for trial. Plaintiff fails to provide this court with any evidentiary material supporting his position.[3]

Plaintiff demonstrates that the train couplers failed to couple automatically and this failure caused his back injury;

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[3]The only evidence presented regarding the defectiveness of the drawbar was an out-of-court statement made by a fellow employee approximately two months after the accident informing plaintiff there was supposedly something wrong with the operating lever. (Doc. 24 at 2). This statement is inadmissible for two reasons: it is hearsay and lack of competence (i.e., there is no showing of the witness's basis for knowledge and no indication of temporal proximity to the accident giving rise to this lawsuit.)

the defendant, however, adequately rebuts this claim. Defendant shows that the drawbars were not properly aligned and the equipment became improperly set during the ordinary course of railroad operations.[4] Therefore, under Hiles, defendant cannot be held liable under the FSAA for injuries incurred by plaintiff while trying to straighten a drawbar which became misaligned during the ordinary course of operations.

Although there is little Sixth Circuit case law directly on point, other circuits also hold that mis-alignment of non-defective couplers does not violate the Act.[5] Accordingly, defendant is entitled to summary judgment and dismissal of the FSAA claim as a matter of law.

B. Boiler Inspection Act

Plaintiff alleges a violation of the BIA in paragraph 11 of his complaint. (Doc. 1 at 3.) 49 U.S.C.A. § 20701(1)

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[4]Plaintiff admitted the two railroad cars had not coupled because the drawbars were misaligned, (Doc. 24 at 2). Similarly, Plaintiff stated it is a common part of his job to align misaligned drawbars. (Doc. 17 at 5).

[5]See Reed v. Philadelphia, Bethlehem & New England R.R. Co., 939 F.2d 128 (3rd Cir. 1991) (no violation of the Act where the failure to couple was not caused by defective equipment) and Lisek v. Norfolk and Western Railway Co., 30 F.3d 823, 830-831 (7th Cir. 1994) (summary judgment affirmed since "it is simply not reasonable to hold that such misalignment amounts to a violation of the Act."

states, "A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances - (1) are in proper condition and safe to operate without unnecessary danger of personal injury."

Defendant moves for summary judgment claiming there is no evidence plaintiff's injury involved a locomotive.[6] n6 Because plaintiff remains silent and does not respond to defendant's position, Plaintiff does not fulfill its burden of setting forth specific facts showing a genuine issue for trial. Therefore, defendant's motion for summary judgment is granted and the BIA claim is also dismissed.

Conclusion

For the foregoing reasons, it is

ORDERED THAT

Defendant's motion for summary judgment (Doc. 17), shall be, and hereby is, granted.

So ordered.

/s/_____
James G. Carr
United States District Judge

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[6]To be a "locomotive" within the coverage of the Boiler Inspection Act, a vehicle must operate on railroad tracks and must perform a locomotive function. Garcia v. Burlington Northern Ry. Co., 818 F.2d 713, 715 (10th Cir. 1987).

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 9, 2001]

No. 99-4423

GREGORY G. EHMANN, *Plaintiff-Appellant*,

v.

NORFOLK SOUTHERN CORPORATION, *Defendant-Appellee*.

BEFORE: DAUGHTREY and GILMAN, Circuit Judges; HEYBURN,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

*Hon. John G. Heyburn, II, United States District Judge for the Western District of Kentucky, sitting by designation.

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Safety Appliances Act, 49 U.S.C. §§ 20301 et seq., in relevant parts, reads as follows:

> (a) General.--Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines --
>
> (1) a vehicle only if it is equipped with--
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . ."
>
> 49 U.S.C. § 20302.